SOME ASPECTS OF THE NATURE OF PERMANENT ALIMONY.

The word, "alimony" is indiscriminately applied to the provision made for the wife in both divorces *a mensa et thoro* and divorces *a vinculo matrimonii* but it is obvious that the basis of the award cannot be the same in each case for where the relation of husband and wife still exists, as in the case of a divorce *a mensa et thoro,* a decree for alimony is no more than a recognition of a common-law duty coextensive with and dependent on the relation of husband and wife. Where, however, the relation has been finally terminated and the parties stand henceforth as strangers to each other, an obligation to pay alimony must rest on something other than the legal recognition of an already existing duty, for no such duty can be discovered, and it therefore becomes necessary to point to an obligation created by the law or the courts at the time of the dissolution of the marriage.

It is with this latter type of alimony, known as "permanent alimony" and a creation of modern law,[1] that this article is concerned,[2] and particularly with an inquiry into some aspects of alimony as set forth by the courts of New York.

There are two opposing views of the nature of alimony which will be made the basis of our discussion. They are stated by Chief Judge Cullen in the case of *Wilson* v. *Hinman.*[3]

(1) Alimony is a settlement of the property rights of the parties and a distribution of the assets of the quasi-partnership hitherto existing.

(2) Alimony is a right of the same character as the right of support lost by the dissolution of the marriage.

The difference in these views is of more than theoretical importance, for on which theory is adopted depend, as we shall see, the wife's rights and the husband's liabilities in any case where it is contended that some change in the situation of the parties since the award of alimony is of such importance that the award should be annulled or modified.

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[1]In England, for example, prior to the year 1858, no judicial divorces dissolving the bonds of matrimony originally valid were allowed.

[2]It should therefore be understood that "alimony" is used in this article as referring to permanent alimony.

[3](1905) 182 N. Y. 408, 75 N. E. 236

It will, of course, be impossible to find one theory of alimony so distinctly adopted in all cases that it is never necessary to recur to the other theory to support a particular decision, for the question is close and the classification not altogether satisfying.

The later decisions of New York, says Judge Cullen, all adopt the view that alimony is a right essentially of the same character as the right of support lost by the dissolution of the marriage—the second of the two views he mentions. Decisions since *Wilson* v. *Hinman* have added considerably to the law on this subject and after an examination of some of them we may perhaps be better able to determine how far this view of alimony still prevails.

The effect of the death of the divorced husband or wife, after final judgment of divorce, has been the question before the courts in the most recent cases discussing the nature of alimony. Taking up first the effect of the death of the wife, we may say that it is only where the husband is in arrears at the time of her death that this question would arise. It is quite too elementary for discussion to say that the wife's rights are limited by her life and whatever claim her personal representatives may make against her former husband must be based on an obligation incurred during her lifetime.[4] The recent cases, however, have not been concerned with efforts to collect beyond the wife's lifetime but with the question whether even arrears accruing in her lifetime could be collected after her death.

In *Faversham* v. *Faversham*[5] the Appellate Division in the First Department reached the conclusion that a decree for alimony does not create a debt in the ordinary sense of the word, but rather defines and makes specific the husband's original obligation (the second of the two views mentioned above) and this obligation, being personal, ceases upon the wife's death, even as to accrued alimony. The right to receive being unassignable, it is unsurvivable. That it is not a property right is further shown, said the court, by the rules of law meant for its protection—it ordinarily cannot be reached by the wife's creditors, it is not

[4]Where an award in gross is made and payment is deferred or to be made by instalments, we can properly say, since the amount to be paid is definite and certain, that the obligation was incurred in the wife's lifetime, even though it happens that payment has not been made at the time of her death. Dinet *v.* Eigenmann (1875) 80 Ill. 274, 279; see a case in one of our earliest volumes of state reports—Smith *v.* Smith (Conn. 1792) 1 Root, 349.

[5](1914) 162 App. Div. 521, 146 N. Y. Supp. 569.

discharged in bankruptcy, and the husband cannot set-off a debt due to him from his wife.

This is the theory of alimony as an obligation of a purely personal nature followed to its full extent. The argument seems to be that if the widow had not received proper support in her lifetime, her estate would have no claim for arrears against her husband; similarly, if the divorced wife does not collect her arrears in her lifetime, her estate should not be allowed to collect them after her death. The Court of Appeals was soon called upon to pass on this question in *Van Ness* v. *Ransom*.[6] Their decision, overruling *Faversham* v. *Faversham,* was that arrears of alimony constitute a property right which survives in favor of the deceased wife's personal representatives against even the deceased husband's estate. The higher court approved *Faversham* v. *Faversham* to the extent of holding that alimony was a substitute for that liability of the husband which ended with the divorce but not to the extent of regarding a claim for alimony as a purely personal one. It is property, said the court, but property of a peculiar species which needs the special protection of the court, and which is not to be diverted from its purpose—the maintenance and support of the wife. There was no money judgment for the arrears in the lifetime of the wife and the holding that the wife's representatives were entitled to the arrears without such a judgment seems to align the Court of Appeals, as far as arrears are concerned, with the adherents of the property doctrine as firmly as the Appellate Division took the "personal obligation" view.

It is submitted that the proper view is that of the higher court. The parties are no longer husband and wife and the decree for alimony should not be taken to establish a purely personal relation between parties whose other personal relations have just been completely severed by the same decree. Comparisons between the woman who continues a wife and the woman who has divorced her husband are of value for some purposes but it is difficult to see how they are of much value in discussing the nature of a claim for money where the woman in the one case has asked for and obtained a judgment that money shall be paid her, since she is no longer a wife, and the woman in the other case has not asked for such a judgment, does not want it

[6](1915) 215 N. Y. 557, 109 N. E. 593.

and bases her claim for support on the very fact that she is a wife. Indeed, accepting the analogy between wife and divorced wife, we can uphold the decision in *Van Ness* v. *Ransom.* While it is true that if the husband had not given his wife sufficient to eat and drink and wear, her estate could not sue him, still if she had pledged his credit to obtain the support to which she was entitled those who had furnished her such support could sue him after her death. Similarly, then, the divorced wife's estate should be allowed to collect arrears accrued before her death, the obligation having been perfected in both cases.

The reasons advanced in *Faversham* v. *Faversham* for holding that alimony is not a property right do not seem to be conclusive. It is true that at common law and as a general rule the qualities of assignability and survivability are tests each of the other and convertible terms, but it does not follow that it is impossible to have the one without the other. The legislature may break the connection and furnish a new and statutory rule of assignability, leaving the law as to the survival of causes of action unchanged,[7] and where the statutory rule is as clear as that of New York, where alimony is specifically awarded for the "support" of the wife,[8] it would seem that the legislature has done so and that the court is amply justified in protecting the divorced wife's alimony from creditors and at the same time regarding it as a survivable property right. It is a familiar enough arrangement in the law to limit the rights of certain classes of persons in their dealings with their own property or of third parties in their attempts to intermeddle with the property of persons of such classes, yet it does not follow that the particular *res* in question is any less property. Because an infant cannot execute a valid assignment of a cause of action, it would hardly be contended that it necessarily died with him. Similarly, there is no valid reason why alimony must be held to be a personal right simply because it is protected in the various ways mentioned in *Faversham* v. *Faversham.*

There is a further practical reason why unpaid alimony should be collectible after the divorced wife's death—it would add to her difficulty in getting support were those asked to give her credit to know that her death would abate any claim for arrears, even though the husband responsible for those arrears were still alive and solvent.

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[7]Blake *v.* Griswold (1887) 104 N. Y. 613, 616, 11 N. E. 137.

[8]Code Civ. Proc. § 1772.

Where the former husband dies first we have a situation presenting somewhat more difficulty than where the wife predeceases her husband. This difficulty is created by the fact that the provision for alimony in the final decree is sometimes so worded as not to depend on the continuance of the husband's life. Of course, the husband can voluntarily make provision, by contract or otherwise, for the divorced wife's support, to continue after his death, and an agreement of this character does not contravene public policy and performance would undoubtedly be enforced,[9] but it is obvious that the courts are not in such a case dealing with any question of alimony but merely with a contract not requiring an inquiry into the status of the parties making it. Such an arrangement is not an agreement for alimony but one in lieu of alimony.

But in the absence of such a contract, can the decree provide for the support of the wife during the continuance of her life, irrespective of the continuance of the life of the husband? If alimony is considered from the first viewpoint, *viz.*, a distribution of the assets of a quasi-partnership, there would seem to be no constitutional or other hindrance to a statute that directs the court to make provision for alimony to continue after the death of either spouse, for where alimony is merely a distribution of assets, there can be no difference in principle whether payment is decreed in a lump sum or by installments payable on definite future dates, notwithstanding the husband or the wife may die before such dates. The only reason for inquiring into the probable extent of the wife's life is to determine the period during which her support should be provided for and by our premise that is of no importance in this case.

But under the view that the obligation to pay alimony is an obligation of the same nature as that of the marital duty of support, which is imposed on the husband only during his lifetime, it seems clear that the courts cannot compel him to make provision for its continuance after his death. Such is the clear and well-established rule in New York,[10] even though the decree may purport to provide for the wife during the continuance of her natural life.[11]

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[9]Barnes *v.* Klug (1908) 129 App. Div. 192, 113 N. Y. Supp. 325.

[10]Barnes *v.* Klug (1908) 129 App. Div. 192, 195, 113 N. Y. Supp. 325.

[11]Johns *v.* Johns (1899) 44 App. Div. 533, 60 N. Y. Supp. 865; affd. on opinion below, 166 N. Y. 613, 59 N. E. 1124; 14 Cyc 788.

The case of *Burr* v. *Burr*[12] evidently being one of those hard cases which make poor law, raised a doubt as to whether the effect of a requirement of security for the payment of alimony was not sufficient to charge the estate of the deceased husband. In that case (a suit by the wife for a separation), Chancellor Walworth dismissed the objection that the vice-chancellor could not authorize alimony to continue beyond the life of the husband as "clearly untenable."[13] The General Term, in *Galusha* v. *Galusha,*[14] laid down a doctrine, apparently founded on *Burr* v. *Burr,* that while a general award of alimony against the husband terminated at his death, it could be made to survive by a direction that he give security for its payment. The Appellate Division, following this doctrine, held that a decree awarding a certain sum annually to a wife, "so long as she shall live" and requiring the husband to give a mortgage upon real estate as security for its payment, enlarged the husband's obligation so that the lien of the mortgage did not terminate upon his death.[15] The Court of Appeals refused to make this exception to the general rule of non-survivability, stating that the doctrine attempted to be established could not rest on any solid foundation.[16]

It is impossible to see how the giving of security can make survivable what was not survivable before. The present New York statute makes it the duty of the husband merely to provide for the support of the wife as justice requires;[17] under the old Revised Statutes, in force when *Burr* v. *Burr* was decided, the court could make a provision for the wife "out of his property, as may appear just and proper". It may be doubted whether this language was intended to give statutory authority to the adoption of a theory of alimony as a division of property but certainly no such interpretation can be derived from the present statutory provision, and it is difficult to see by what process of reasoning one could assume that by the mere giving of security the security could be made to outlast the obligation.

To adopt a view contrary to that taken in New York and to hold that the wife is entitled to alimony even after the death of

[12](N. Y. 1842) 10 Paige, 20.

[13]At p. 37.

[14](1887) 43 Hun, 181.

[15]Wilson *v.* Hinman (1904) 99 App. Div. 41, 90 N. Y. Supp. 746.

[16]Wilson *v.* Hinman (1905) 182 N. Y. 408, 75 N. E. 236.

[17]Code Civ. Proc. § 1759.

the husband would lead to an anomalous situation. Assuming that a man died leaving real estate, under New York law his undivorced wife would have an indefeasible right only to dower for he could, of course, cut her off from all interest in his personalty, but if she had divorced him she would be entitled not only to dower in all property of which he was seised during coverture but to alimony as well, the consequence being that she would have a larger income than if she had been undivorced. Further, such a situation would be unjust to creditors. The amount of alimony depends, in most cases, largely upon the income of the husband derived from his personal efforts. If the husband were incapacitated for work and the amount were based on his acquired property alone, the chances are that it would be much reduced.[18] Yet although this source of revenue is entirely withdrawn on his death the amount of alimony would remain the same and the divorced wife would be a creditor with other creditors (if perhaps not a preferred creditor), while the undivorced wife would have no share in her husband's personal estate until every creditor had been paid in full. These and other cogent objections can be raised to any other doctrine than that of *Wilson* v. *Hinman.*[19]

Whether a wife may hold the husband's estate for alimony due and unpaid at the time of his death is a question analogous to the question raised by her death, as was said in *Van Ness* v. *Ransom,*[20] and that case may be said to pass on both questions for in that action both husband and wife were deceased.

These cases show clearly enough that if the husband's liability for unpaid alimony is not a debt it is certainly something more than a liability on a personal claim ceasing at the death of either obligor or obligee. As the Supreme Judicial Court of Massachusetts has said:[21]

"The liability for unpaid alimony may not, strictly speaking, be a debt within the legal meaning of that word. But it gives to the wife in proceedings like this the right as a creditor to enforce payment in the same manner and to as great an extent as if she were a creditor in the most exact sense of that word."

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[18]Field *v.* Field (N. Y. 1885) 15 Abb. N. Cas. 434.

[19]Of course, statutes may change the rules here laid down and decree alimony to continue beyond the time of death of the husband. See the learned note to Wilson *v.* Hinman in 2 L. R. A. [N. S.] 239.

[20](1915) 215 N. Y. 557, 559, 109 N. E. 593.

[21]McIlroy *v.* McIlroy (1911) 208 Mass. 458, 464, 465, 94 N. E. 696, 699.

An interesting question would be presented to the court were an effort made by the representatives of a deceased wife to punish a husband for contempt in failing to pay arrears of alimony. By the New York code (§ 1773) the institution of proceedings to punish for contempt is discretionary with the court and such proceedings, as we have seen, are based on a judgment or an order providing for the "support" of the wife. Assuming that the court were willing to permit the institution of such proceedings, could they, when brought by the representatives of a deceased wife, properly be denominated proceedings for her "support"? In the absence of any authority on the point, it is apprehended not, nor could the similar statutory remedies of a requirement of security or directing sequestration[22] be invoked. The duty and obligation of a husband to provide maintenance for his wife is not merely contractual but one the disregard of which partakes largely of the nature of a tort[23] and, it might be added, a tort against the public, for the husband owes it to the public that his wife shall not become a charge upon it.[24] With the death of the wife the obligation of the husband loses its quasi-public character and becomes purely a contractual matter, not differing from other obligations of the husband and not entitling those who merely stand in the place of business representatives of the wife to the benefit of a weapon of the law designed to make of her claim a preferred claim over other debts of the husband. Commitment for contempt has always been confined, both under the statutes and the decisions, to cases for the support of the wife or the education of the children and efforts to punish for contempt for non-payment of final costs[25] or of counsel fees[26] have been defeated. It is obviously contemplated that the right to procure punishment for contempt of the delinquent husband shall be strictly personal to the wife.

Perhaps the question of the true nature of alimony is most interestingly discussed in the case of *Livingston* v. *Livingston*,[27]

[22]Code Civ. Proc. § 1772.

[23]Murray *v.* Murray (1888) 84 Ala. 363, 4 So. 239.

[24]People *ex rel* Keller *v.* Shrady (1899) 40 App. Div. 460, 58 N. Y. Supp. 143. Of course there may be a situation where it is advisable for the court to ignore the public aspect of the contempt. Tafel *v.* Tafel (1915) 169 App. Div. 417, 155 N. Y. Supp. 164.

[25]Jacquin *v.* Jacquin (1885) 36 Hun, 378.

[26]Branth *v.* Branth (1891) 13 N. Y. Supp. 360.

[27](1903) 173 N. Y. 377, 66 N. E. 123.

in which the Court of Appeals, by a vote of four to three, laid down the doctrine, now firmly established in the law of New York, that alimony granted by a final decree is a vested and substantial right of property which, in the absence of statute or of express reservation of the right to modify in the original decree, is not subject to judicial or legislative control thereafter.[28]

Gray, J., speaking for the majority of the court[29] asserted that to speak of alimony as the wife's "mere potential expectant right" is to lose sight of the nature of a final decree awarding alimony; that the relation having been terminated, neither party has any rights or obligations founded upon or springing out of the marriage relation but the judgment defines and creates a new obligation on the husband's part in the nature of a vested right in the wife. Although the interest is an expectant one, it is an interest fixed by judgment and not a mere contingency; it is not a capacity to acquire a right to the payment of money; it is a right fixed by the judgment and hence vested in the plaintiff.

O'Brien, J., speaking for the minority and discussing alimony as property[30] contended that this incidental provision in a judgment of divorce, called alimony, which the law or the courts might grant or deny at pleasure, was not property, it could not be sold or transferred or bequeathed or pass in case of intestacy, and was a mere creation of equity, having "no more of the attributes of property than the common-law right to marital support, for which it is an imperfect substitute."

The difference in viewpoints is here pronounced—the majority, both in the Court of Appeals and the Appellate Division[31] took the view that alimony was property, and hence under the protection of that provision of the Constitution which declares that property shall not be taken without due process of law; the minority in both courts as firmly denied that alimony was property and asserted that it was only a right of support.

Now it is clear that the right of the undivorced wife to support is not vested in the ordinary sense of that term. A "vested right", to be within the protection of the Constitution, must be

[28]There is now a statute, giving the court power at any time after final judgment to annul, vary or modify a provision for alimony (Code Civ. Proc. § 1759) and so this discussion is chiefly of historical interest as respects New York.

[29]At p. 381.

[30]At p. 389.

[31](1902) 74 App. Div. 261, 77 N. Y. Supp. 476.

something more than a mere expectation based upon the anticipated continuance of existing laws[32] and it could therefore hardly be contended that the right of the undivorced wife to support is vested, for that right has been repeatedly modified by statute, even to the extent in some States of making the wife jointly liable for family expenses[33] and no case seems to suggest that the legislature could not, if it so desired, wipe out this common-law duty of the husband. But if the divorced wife's rights after final decree cannot, in the absence of saving provision, be disturbed, they are certainly vested, and if they are vested they must be rights of property. It may be that there are vested rights which, strictly speaking, are not property as, for example, the right to insist on the bar of the statute of limitations, but a claim for alimony is not of this negative character but of a material and measurable character, and resembles many other choses in action which a suit will change into a money judgment, and, as we have previously seen, the mere fact that there are lacking certain customary attributes of property, such as assignability, need not compel us to deny that we are dealing with a question of property.

Assuming, then, that alimony after final decree is a vested property right, as the majority declare, can it possibly be of the same nature as the undivorced wife's right of support? Putting the question differently, can we have a right of support which is during wifehood a mere expectation but on divorce changed into a property right? The New York courts have made statements to the effect that in such a situation as this the form and measure are changed but the substance of the right remains the same.[34] It is submitted that such a statement has little meaning in this case. If the substance of the right is unchanged, then we would expect to find alimony granted or withheld for the same reasons as would govern the court in granting or withholding support from the undivorced wife, but there are in this article a number of instances[35] which show clearly enough that the courts do not intend to base their decisions as to alimony on what they would do in the case of the undivorced wife.

[32]Matter of the Mayor (1898) 33 App. Div. 365, 53 N. Y. Supp. 875; 8 Words & Phrases 7309.

[33]15 L. R. A. 717.

[34]Romaine *v.* Chauncey (1892) 129 N. Y. 566, 570, 29 N. E. 826.

[35]See *e. g.*, the discussion of the effect of the wife's adultery, which follows.

The correct view seems to be that alimony, when once beyond the control of the courts, is unquestionably a vested property right. Nothing can happen that will deprive the wife of her alimony except her death and that, of course, no more takes away its vested character than the possibility of the death of a life remainderman in the life of the present tenant makes the interest of the former contingent. If one holds that "alimony is the support which the court decrees in favor of the wife as a substitute for the common law right of marital support", then it is illogical, as Judge O'Brien seems to think, to hold the substitute under the decree "more sacred and unchangeable than the original right which she acquired by the marriage, since the latter may be affected by legislation, while the former cannot be". But if the fact is that alimony in such a case as *Livingston* v. *Livingston* has been transformed into a property right, there is nothing illogical in holding it more sacred and unchangeable than the original right which was strictly of a personal nature.

That when a decree for alimony is beyond the control of the courts we have a property right and not a right analogous to the right of support is shown by decisions on the effect of the misconduct of the divorced wife. It is well established in New York that the adultery of a wife relieves the husband of the duty of support.[36] Such being the case, we should expect to find the divorced wife losing her alimony upon proof of similar misconduct but, instead, it has been laid down in no uncertain terms that it is no part of the province of the court which gives the wife alimony "to watch over her subsequent conduct in life, or to take proof of it, as a ground for affecting the right to an allowance, or its amount".[37] *Hawkins* v. *Hawkins*[38] may be poor law (and the writer is inclined to agree with the minority that a decision should not be supported which leaves the parties husband and wife and yet denies one of the chief incidents of that status) but it represents the law of New York, and a comparison of that case with *Forrest* v. *Forrest* seems to show that there would be considerable difficulty in maintaining, where the decree is unchangeable, that alimony is similar to the right of support. Such a decree changes a mere expectation into a right of property not dependent on

[36]Hawkins *v.* Hawkins (1908) 193 N. Y. 409, 86 N. E. 468; Poss *v.* Poss (1914) 164 App. Div. 213, 149 N. Y. Supp. 587.

[37]Forrest *v.* Forrest (N. Y. 1859) 9 Abb. Prac. 289.

[38]*Supra*, n. 36.

personal relations and creates a situation not different from one in which only strangers are concerned. It may be that this is a view "precisely opposite to that which obtains in this State",[39] but in the case of sexual misconduct of the divorced wife, it is submitted this is the proper theory on which to justify such a result as was reached in *Forrest* v. *Forrest.* Of course, it can be argued that the divorced wife owes no particular duty to her former husband not to be guilty of improper conduct of this nature, whereas the wife always owes that duty to her husband, but the right of support is not usually declared to be compensation for maintaining a proper standard of morals—the usual theory is that it is compensation for the services performed by the wife, and it does not seem that it is necessary to make proper conduct the basis of the right. If the husband wishes no longer to support a wife guilty of adultery, he should sue for divorce; if on account of his own misconduct he is not entitled to a divorce, as in *Hawkins* v. *Hawkins,* there is no particular injustice in compelling him to support his wife merely because she happens to have committed the same wrong as himself.

The courts naturally make use of the reserve power in the statute to prevent the continuance of situations offensive to good morals and refuse to give their sanction to what Stapleton, J., described in a recent case as "a decretal immunity for adultery."[40] It should be said, in passing, that there is nothing in the constitutional provision as to the impairment of the obligation of contracts which will prevent the courts from modifying their decrees because a provision for alimony in a final judgment is not a contract within the meaning of the Constitution.[41]

A similar situation arises where the divorced wife remarries, but here there is a clear statutory direction that the court shall annul a provision for alimony on proof of the remarriage.[42] It is somewhat surprising to find judges saying, in the face of that statute, that "the fact of marriage, merely in itself, is perhaps not an element to be considered".[43] There seems to be a failure

[39]Faversham *v.* Faversham (1914) 161 App. Div. 521, 524, 146 N. Y. Supp. 569.

[40]Tafel *v.* Tafel (1915) 169 App. Div. 417, 419, 155 N. Y. Supp. 164.

[41]Livingston *v.* Livingston (1903) 173 N. Y. 377, 382, 387, 66 N. E. 123.

[42]Code Civ. Proc. § 1771; Mowbray *v.* Mowbray (1910) 136 App. Div. 513, 121 N. Y. Supp. 45.

[43]Comstock *v.* Comstock (1906) 49 Misc. 599, 99 N. Y. Supp. 1057; but see Kiralfy *v.* Kiralfy (1901) 36 Misc. 407, 409, 73 N. Y. Supp. 708.

on the part of some judges to realize that it is an absurd and improper situation for a woman to be entitled to support from a present and a former husband. It is due probably to an idea that alimony is "a punishment justly imposed upon him (*i. e.*, the divorced husband) for the violation of his marital obligations",[44] an idea that keeps cropping up at frequent intervals,[45] and which, of course, is quite illogical. In granting alimony a civil court should be concerned with only one thing—the provision for the support of the wife—and not with any attempt to punish a wrongdoer. We have spoken of the failure to support as in the nature of a tort to the public but that, no more than adultery, is a crime to be punished by a divorce court. We can very properly call failure to support a tort because the gist of a tort action is the securing of compensation to the injured party, not the punishment of the defendant.

We have perhaps discussed the nature of permanent alimony sufficiently to draw some conclusions as to the correctness of the two theories mentioned at the beginning of this article.

In the first place, there is little authority in New York for the theory that alimony is a distribution of the assets of a quasi-partnership. One or two suggestions to that effect may be found in the reports[46] but it has never been distinctly advocated in any modern case.

Next, it is distinctly asserted in a number of cases that alimony is a right of the same character as, and in substitution for, the right of support lost by the dissolution of the marriage, but when we come to examine these cases, we find that this theory is applied only where the right to payment of alimony has not yet accrued or may still be taken away by the courts and that where the right to payment has accrued or the power to affect a decree of alimony no longer exists, alimony is treated as a vested property right, not affected by considerations of a personal nature.

It is, of course, always true that an award of alimony rests in the marital obligation of the husband[47] but by such a statement the courts do not mean that where the award is once beyond their control they will treat accrued or vested alimony as anything but

[44]Shepherd *v.* Shepherd (1874) 1 Hun, 240; affd. 58 N. Y. 644.

[45]See *e. g.*, Gibson *v.* Gibson (1913) 81 Misc. 508, 513, 143 N. Y. Supp. 37.

[46]Forrest *v.* Forrest (N. Y. 1859) 9 Abb. Prac. 289.

[47]Wilson *v.* Hinman (1905) 182 N. Y. 408, 412, 75 N. E. 236.

a debt between strangers. They refer rather to alimony not yet due and payable or to awards still within their control. Thus where alimony is accrued or irrevocably vested, we find that changes in the divorced wife's status or conduct, such as remarriage or sexual misconduct, are not regarded as having any direct effect on her right to future alimony—a clear indication that the obligation does not arise from the marital relation but from a relation of debtor and creditor. The right of support is perhaps not immediately transformed by the judgment of divorce into property, and in that sense the substance may for a time remain unchanged, but when payments under the decree have accrued or are beyond the control of the courts, then it does seem as if a very substantial change has taken place, for something has been made into property which was not previously property. But with a statute on the books which gives the court power to annul, vary or modify a final decree, we ordinarily will not be dealing with a property right but with a right that we can treat as similar to a right of support, and which we can control in a way which is just, taking into consideration any changes in the situation of the parties necessitating a modification of the award. With such a statute, only arrears of alimony will be property—in all other situations the analogy to the right of support can be considered and the former personal relations of the parties given their due weight.

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